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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1506

MARTIN WHITCOMB, and
ROMAINE WHITCOMB, his wife,

Petitioners,

v.

THE SANITARY COMMISSION OF
ANNE ARUNDEL COUNTY,

FRANK E. RICE, Superintendent of the Department
of Public Works of Anne Arundel County, and
JOSEPH ALTON, County Executive of
Anne Arundel County,

Respondents.

Petition For Certiorari
To The United States Court Of Appeals For The Fourth Circuit

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PRELIMINARY STATEMENT

The discharge of a litigant out of court unheard, is a matter which should not be accomplished as off-handedly as was done here. Particularly, in light of the very substantial federal questions, relating to the Civil Rights Acts (Title

42, Sec. 1983 and Title 28, Sec. 1343), which were raised and, more specifically, the question of whether the right to a viable environment is in the nature of a "property right", or in the nature of a "personal liberty".

The Petitioner therefore requests the issuance of the Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, which had rejected the Petitioners' appeal from the District Court upon this question, out of hand, without a hearing, without reading of the briefs, apparently, and upon a mere Motion for Summary Affirmance filed by the Defendants.

CITATIONS TO OPINIONS BELOW

The opinion in question is unreported; it is the following:

ORDER DENYING RECONSIDERATION

Upon consideration of the telegram treated as a motion for Reconsideration of the Order of Affirmance,

It is ORDERED that the Motion for Reconsideration be, and it is hereby, DENIED.

This opinion, in turn, was a refusal to reconsider the following unreported opinion of the same Court:

> Order of Affirmance
>
> "Upon consideration of the Motion of the Appellees to dismiss this Appeal because of the failure of the Appellants to file a bond for costs, it is:
>
> Ordered:
>
> That the said Motion be, and it is hereby, denied; but, upon consideration of the Motion of the Appellees for Summary Affirmance of the judgment of the District Court, it is further:
>
> Ordered:
>
> That the said Motion for Affirmance be granted and that the judgment of the District Court now on ap-

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peal be, and it is hereby, affirmed, with costs to the Appellees..."

The substantive opinion below, which was being appealed, is appended hereto at Appendix Page 1, and consisted of a colloquy between Court and Counsel conducted at the hearing on the Motion to Dismiss. This Opinion (in the colloquy), which was unreported, was by R. Dorsey Watkins, J.

The judgment, then, sought to be reviewed herein, is the Order (above) of the Fourth Circuit Court of Appeals denying the Appellants' Motion for Reconsideration of the Order of Affirmance, which had theretofore been summarily rendered.

The Complainant's Petition, in its entirety, upon which the Fourth Circuit acted in refusing reconsideration and a hearing, was the following:

"To the Honorable, the Judges of said Court:

"Plaintiffs, by Leonard J. Kerpelman, their Attorney, move for reconsideration of the Court's granting of Motion for Summary Affirmance, for that:

"There is presented for review herein a complex matter of first impression, as was elucidated in the Brief, which was not considered by the Court: namely, whether Sec. 1983, Civil Rights Act, includes violation of environmental para-property rights of such vital important nature that they merge into, or become, protected civil liberties.

"A more mature consideration, with benefit of Briefs, and argument, is called for, it is respectfully suggested.

"The novelty and importance of the proposition apparently overlooked by the Court, is respectfully urged on the Court as reason for reconsideration.

"/s/ Leonard J. Kerpelman

Attorney for Plaintiffs"

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254, wherein this Court is granted jurisdiction by Writ of Certiorari upon the petition of any party of any civil case, after rendition of judgment.

QUESTIONS PRESENTED

1. The direct question presented, is whether the Fourth Circuit Court of Appeals abused its discretion in refusing to grant a meaningful hearing, by issuing an "Order of Summary Affirmance," on what was, it is suggested, an important federal question, believed perhaps to have been raised for the first time, concerning the extent to which environmental rights of litigants are protected by the Civil Rights Acts.

2. The second question, which is really inextricably tied to the first, is the question of whether the right to a pure and clean environment, and to a minimal degree of undisturbed enjoyment of property, is a "right of personal liberty", or a "mere property right"; whether, in fact, under the Civil Rights Acts, jurisdiction extends to such questions as the Petitioners', in which personal liberty becomes merged into property rights.

The questions are further worthy of consideration by this Court, because of the fact that the action was brought as a class action, and, also, therefore, directly raises the issue of whether environmental rights of taxpaying citizens are not encompassed in Civil Rights Acts jurisdiction under certain circumstances.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following:

1. A portion of the Fourteenth Amendment to the Constitution of the United States:

> ". . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 1343 of Title 28, U.S.C.A., The Civil Rights Act:

> "The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ". . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States, or by any Act of Congress, providing for equal rights of citizens, or of all persons within the jurisdiction of the United States;
>
> ". . . (4) To recover damages, or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the rights to vote."

3. Also, Sec. 1983, of Title 42:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution

and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The case raises the issue of whether the Plaintiffs have been deprived of due process of law under the Fourteenth Amendment to the United States Constitution because of the apparently haphazard, summary way in which the case was disposed by the United States Circuit Court of Appeals for the Fourth Circuit.

The case had originally been heard below, in the United States District Court for the District of Maryland, R. Dorsey Watkins, J.

Upon appeal from Judge Watkins' decision, which decision is contained in the colloquy between Court and Counsel, which appears in the Appendix, (pp. 1-11) Judge Watkins lamented that he did not have, according to his conception of the cases, authority to entertain the Complainants' Petition under the Civil Rights Acts, (Sec. 1983, Title 42 or Sec. 1343, Title 28.)

It is respectfully suggested, that, very likely, the law is otherwise. Judge Watkins is a much admired jurist among the lawyers of his District; but rather conservative-minded as far as such matters as judicial restraint, or the breadth of a statute, are concerned.

However, it would seem that he was rather clearly in an area where the cases had not decided against the court having jurisdiction. In fact, to the contrary, as is explicated below, under the title "ARGUMENT", the cases do seem to indicate the existence of jurisdiction over such rights.

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The Petitioners, particularly after the rather clear encouragement, or at least sympathy to their position, which was offered by the lower court, in good faith filed an Appeal to the Fourth Circuit Court of Appeals.

They filed a Brief.

To their astoundment, the Defendants filed a "Motion for Summary Affirmance".

Shortly thereafter, without argument, and though an Answer to the Motion for Summary Affirmance had been filed, the Court dismissed the Petitioners' case.

Unbelieving, and thinking that certainly the Fourteenth Amendment Due Process provisions would not countenance such dismissal from the judicial course which the Petitioners were following, they filed a Motion for Rehearing, which stated, in part:

> "There is presented for review herein, a complex matter of first impression, as was elucidated in the Brief, which was not considered by the Court: Namely, whether Section 1983, Civil Rights Act, includes violation of environmental para-property rights of such vital important nature that they merge into, or become, protected civil liberties."

This Motion for Rehearing was denied on February 4, 1970. It is from this denial that this Petition is filed.

SUMMARY OF ARGUMENT

1. The substantive case is one of first impression, important, and worthy of consideration by the Court. It involves environmental law.

2. The Complainants were denied Due Process by the "Summary Affirmance" of the Fourth Circuit Court of Appeals.

ARGUMENT

1. General

It is not at all clear that the Complainants are so far outside the purview of Section 1343, or 1983, that they must be turned out of court summarily.

Rather, to the contrary, logical extension, if any extension is necessary, of the decided cases, seems to indicate clearly that the Defendants, by reason and by justice, are within the statutes.

In *Hague v. CIO,* 307 U.S. 500, 507, it was said:

> "Section 24 of the Judicial Code confers original jurisdiction upon District Courts of the United States. Subsection (1) gives jurisdiction of suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 'and' arises under the Constitution or laws of the United States.'"

Monroe v. Pape, 365 U.S. 167, was a case in which the plaintiff, subjected to a false arrest with great contumely, by a public official, sued the public official in a federal court under the Civil Rights Act. The Court there said:

> "The question with which we now deal is the narrower one of whether Congress, in enacting Section 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Cf. *Williams v. United States,* 341 U.S. 97; *Screws v. United States,* 325 U.S. 91; *United States v. Classic,* 313 U.S. 299. We conclude that it did so intend.
>
> . . . "It is pointed out that under Illinois law, a simple remedy is offered for that violation, and that, so far as it appears, the courts of Illinois are available to give Petitioners that full redress which the common law affords, for violence done to a person;

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and it is earnestly argued that 'no statute, ordinance, regulation, custom or usage,' of Illinois bars that redress.

. . . "But the purposes were much broader (than the suppression of the Ku Klux Klan). The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, *was not available in practice.* (Emph. supp.)

. . . "It was not unavailability of state remedies, but the failure of certain states to enforce the laws with an equal hand . . . (and no jurisdictional amount was to be necessary)."

In *Hague v. CIO, Supra,* the large problem was the question of whether the Civil Rights Act was available without the presence of the jurisdictional amount. The court said, there must be such an amount, in substantial actuality:

"(I)t does not follow that in a suit to restrain threatened invasions of such rights a mere averment of the amount in controversy confers jurisdiction. In suits brought under sub-section (1) a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of such amount, calls for substantial proof on the part of the Plaintiff of facts justifying the conclusion that the suit involves the necessary sum. The record here is bare of any showing of the value of the asserted rights to the Respondents individually, and the suggestion that, in total, they have the requisite value is unavailing, since the Plaintiffs may not aggregate...."

In the instant suit, there is no such problem as to certain of the averments of the Complaint. See the averments of paragraphs 2 and 4 of the Complaint.

Assuming that this problem is not merged with the problem which is discussed infra—the problem of whether

environmental rights are a civil right—it is argued here that the Complaints come within the compass of the Civil Rights Acts by virtue of the fact that they had been given a *semblance only* of a Due Process procedure. The *uncontradicted* averment of paragraph 7 of the Complaint is that,

> "subsequent appeals provided by law were inadequate under the Constitution . . .; the hearings were provided under color of Maryland statutes of general application, but did not provide for constitutionally protected immunities of the Complainants against being deprived of their property other than by Due Process of law, in that . . . [the statutes] provide no substantial and adequate review or appeal of the hearings conducted by the administrative bodies, namely Maryland Article 64, Section 222, et. seq., . . . since the said Maryland statute provides that all findings of the administrative bodies *shall be upheld if they were based upon 'any substantial evidence'*". (Emph. supp.).

In other words, the Complainants have claimed that their property was decreased in value by some $35,000, and that they are debarred from preventing this decrease by the sham administrative appeal, which is all that is afforded to them by the Maryland statutes.

In *Abernathy v. Carpenter,* 208 F. Supp. 793 (1962), the court after finding that a matter of "personal liberty," as the term was "used by Mr. Justice Stone in . . . *Hague v. CIO,*" was not involved, said that,

> "There being no jurisdiction under the 'civil rights' provision, 28 U.S.C.A. Section 1343, the sole possible remaining ground for federal jurisdiction is the 'federal question' provision, 28 U.S.C.A., Section 1331.
>
> ". . . This statute requires, in addition to a federal question, an amount in controversy in excess of $10,000."

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It would seem to follow that in the instant case, the Complainants do come within Section 1343, there being no question of the amount in controversy exceeding $10,000.

2. No Brief; No Consideration

But the Appeals Court would not discuss this. It merely cast the Plaintiffs out of court, refusing not only to give any reason, but refusing even to discuss or be briefed on the matter.

Even in a case where the eventual holding of the Circuit Court of Appeals was that "We are satisfied that this appeal raises no substantial question for consideration by this Court and that it is wholly lacking in merit", at least the motion for summary affirmance was "continued, and taken with the case on the merits," and was only decided after briefs, oral argument, and full consideration of all the issues. *Ginsburg v. American Bar Assoc.*, USCCA 7, 1960, 277 F2d 801, cert. den. 81 S Ct. 69, 364 US 829. It is respectfully urged that to do less in this case, important novel issues having been raised, was to deny Due Process.

3. The Right to a Day in Court Is Entitled to a Special Privilege

Free Speech has been accorded a special and privileged status among individual freedoms for some time by this Court (as in *Dombrowski v. Pfister* 85 S.Ct. 1116, 380 U.S. 479, 14 L Ed. 2nd 22, and cases therein cited); the purpose, to avoid "the chilling effect" (*Dombrowski*, 380 U.S. at 487) of its denial by indirection, or by secondary means.

Is *any* right of personal freedom more important, yet more subject to secondary or indirect denial than the right to a meaningful day in Court?

Should not then, the "day in court" be entitled to as substantial protection as Free Speech? Should it not also be specially privileged?

Should not this Court, then, refuse to condone the action which was taken in the Circuit Court of Appeals—the turning out of the Plaintiffs without a hearing on their appeal?

The *nisi prius* federal Court had denied to the Plaintiffs court review.

The Maryland Court had done the same, since the review provided there was by almost any view, but a sham, limited as it was, to the question of whether the County Board had acted on "any" substantial evidence.

For "any" cannot be reconciled with "substantial."

Was ever Due Process so cruelly granted and so cruelly withheld as by the Maryland system? Has *ever* any County Board been so invested with a paucity of cleverness that it could not find "any" evidence to which to attribute its "findings"—its predetermined findings. (Not here—not on the Record anyway—but this Court is respectfully asked to recognize that in instances—in numerous instances in our system—Zoning Boards are notoriously subject to so-called "political" influences. What is the Due Process requirement for an administrative or quasi-judicial board of a type so notoriously subject to such influences? The Petitioners do not shrink from asking the question.)

4. The Matters Complained of, are Matters of "Personal Liberty"

Abernathy v. Carpenter, 208 F. Supp. 793 (1962), was a Special Three Judge Court case, which was affirmed *per curiam*, in 373 U.S. 41.

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In that case, the Court stated that,

> "The claim is simply that [the Plaintiffs] are arbitrarily denied certain exemptions as a penalty for not duly filing their Missouri State Income Tax returns. This is not a circumstance within the purview of the 'Civil Rights' jurisdiction as it is *solely a property or monetary right* and not a right of 'personal liberty', as these terms are used by Mr. Justice Stone in the case of *Hague vs. CIO*...
>
> ". . . [In the] *Schlosser* case, the Court based its opinion on the question of jurisdiction on the undoubtedly correct recognition of that fact that the arbitrary exclusion of a person rightfully belonging to a class of persons legally immune from state taxation is a denial of the 'equal protection' clause of the Fourteenth Amendment."

In *Hague v. CIO, supra,* we find the Supreme Court referring to *Traux v. Raich,* 239 U.S. 33, in which the Supreme Court sustained the jurisdiction of a District Court to entertain the suit of an alien to restrain enforcement of a state statute alleged to be an infringement of the Equal Protection Clause of the Fourteenth Amendment because the statute discriminated against aliens in the "right to seek and retain employment." So "seeking and retaining employment" was denominated, then, a "civil right", a matter of *personal liberty.*

The jurisdiction of a District Court was similarly sustained in *Crane v. Johnson,* 242 U.S. 339, also referred to in *Hague,* wherein the Court was asked to restrain enforcement of a state statute alleged to deny Equal Protection by suppressing freedom to pursue a particular trade or calling.

Justice Stone, in *Hague,* said,

> "For the purpose of the present case, it is important to note that the constitutional right or immunity

> alleged in these two cases [*Truax and Crane*] was one of personal freedom . . . [I]n both cases, the right asserted arose under the Equal Protection, not the Privileges and Immunities clause; in both, the gist of the cause of action was not damage or injury to property, but unconstitutional infringement of a right of personal liberty not susceptible of valuation in money. The jurisdiction was sustained despite the omission of any allegation or proof of jurisdictional amount, pointedly brought to the attention of this court."

The Plaintiffs here respectfully point out that jurisdictional amount in the present case *was not denied,* and state that according to the Court in *Hague,* even if it were, that fact would not be material.

5. Environmental Rights

However, the Plaintiffs wish to emphasize, that in spite of the fact that the Complaint relates to bayside real estate, it relates mainly to environmental matters, as to which, they complain not only for themselves, but in the classical taxpayer-suit phrase, "on behalf of all others similarly situated".

These environmental matters in the Complaint, constitute an inventory of horrors, but horrors which are *nowhere* in the pleadings, *denied* by the Defendants, and which were taken as admitted by the District Court below, which nevertheless dismissed the suit with the finding that the Complaint related to property rights only and not to *personal liberties.*

Some of the un-traversed horrors, were (numbers refer to paragraphs of the Complaint):

> Construction of a sewage disposal plant which will be unsafe to operate, due to the danger of windblown bacteria, accidents and spills; the dangers inherent in

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the handling of chlorine gas on the plant property; the undoubted discharge of noxious fumes, odors, effluents, and toxic and infectious substances which will emanate from the plant upon its completion. (8, 9).

The sewage disposal plant is of a type which *characteristically* gives off noxious odors, fumes, deleterious and toxic substances, and ecology-disrupting effluents, and is subject to accidents which are extremely dangerous to nearby humans; if not well and efficiency operated [the plant] will give off discharges which . . . will destroy the utility and safety of . . . Sandy Point State Park as a bathing and recreation area . . .; harvests of shellfish . . . will be adversely affected, and hazards will be created for sport, recreational, and commercial fishermen and fish consumers. (9).

Plants such as that referred to, are never operated "properly" as that term is generally understood by scientists and engineers, and discharges such as are referred to are *always given off* by such plants. (10).

The plant will be a hazard to the health of the Complainants and to all other residents of Anne Arundel County; it will damage their land and pollute the Chesapeake Bay; it will upset the ecology of the Bay; it will have deleterious effects on Bay recreation and commercial fin-fishing; it will dump insecticides in large quantities into the Bay. (8, 9, 13).

The Defendants blatantly lied to the protestants of the plant, assuring them that the plant would not be constructed to handle industrial sewage and wastes; but within a relatively short time after approval was obtained, the Defendants advertised to others, and made clear that this was not intended to be true, and that expansion of the plant and the handling of such wastes was always fully intended. (15).

In *DDD Realty Co. v. Merrill,* 232 F. Supp. 629, 636, a District Court held that *freedom of association* was abridged, where a state ran a ski run, and tended to force

the plaintiff to join a vacation-trade-association by giving cheaper rates to the members of the association. The case went off on whether a corporation was a person within the meaning of the Fourteenth Amendment, but indicated that freedom of association *was* a personal liberty.

Are these "environmental rights" so far removed from personal liberties, as the court below seemed to think?

The Court stated, (in the present case)

> "I feel . . . that the—while I state for the last time I am in great sympathy for Mr. Kerpelman's fears, apprehensions and desire to keep the state as nearly liveable as can be, . . . it does not . . . fall within the ordinary field . . . of Civil Rights. It is more nearly *a purely property right*, which is not the subject of jurisdiction of the District Courts under the Civil Rights Act (page 10 App.).
>
> "I think to have this stuff discharged where people bathe and where you have shellfish and, hopefully, crabs and other fish is most undesirable, but I just can't see how that constitutes the invasion of the *civil rights* of these plaintiffs or of any individual in the state." (page 8 App.)

But are liberty and property really completely separate and distinct entities which never meet, which never have common borders, which never interwash, which never have common characteristics? It is suggested that such is not true.

If the courts can find that where one is deprived of the right to freely seek a job, equal with others, so that he may at the end of a week receive—property—in the form of pay, then a court can readily find that the right to exist, which depends on the right to breathe, and the right to have water to drink, and in fact the right to have recreation, peace and repose, which are only smaller magnitudes of the right to have any place to stand on

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earth at all, *is* a "personal liberty", for what is one's liberty without life; without the pursuit of happiness.

And, if one is made ill, are his "personal liberties" violated or not? Is not the right to be free from ingesting hepatitis organisms in oysters a personal liberty? One, in a sense, it is true, has a property interest in remaining free from hepatitis, but is it not clearly *more* in the nature of a "personal liberty?"

6. Equal Protection

The Court of first impression seemed to be of the understanding (see App. 7-9) that the Complainants were claiming a wrong had been done to them which had been done to everyone else, and that therefore they had not been treated differently from anyone else in the state, and therefore could not claim a denial of Equal Protection. But the public officials charged as defendants, were being anything but even-handed and non-discriminatory in foisting the plant upon the citizens of the Sandy Point locality and the state as a whole. In the first place, Sandy Point is in large proportion used by Negroes. Also, the Defendants were, on the face of the Complaint, being careful to please the developers of a nearby "industrial park." Not all residents of the state are "similarly situated" to the Complainant. Those who profit as contractors from the plant construction contracts and from the nearby "industrial park", are not. Those who live in the reaches of the Western Maryland mountains are not. Those who rapaciously and tenaciously seek to keep a lower tax base for their particular county, by constructing an inefficient, outmoded, dangerous type of sewage disposal plant, which is in effect highly subsidized by those outsiders who are affected by the bad characteristics of the plant, are not. In short, the Complaint alleges by direct inference that

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the plant was built to give favored treatment to a minor few, at the expense of an ill-favored many. This is the reverse of Equal Protection, perhaps, yet it is still Equal Protection denied! And a question which the Circuit Court of Appeals refused to treat of! That is, it is suggested that where the unlawful acts of public officials complained of have been performed to the disadvantage of very many, for the purpose of favoring a very few, this is as much a denial of Equal Protection as the usual discriminatory type of denial, which is ordinarily wreaked against a minority, substantial though the minority may be, or against a single member of the minority. It seems that if discriminatory treatment of a member of an unfavored race or group is denial of Equal Protection, then that equally indefensible—and the allegations of the Complaint make the actions of the Defendants seem certainly indefensible—*favoring* of a small minority is also a denial of Equal Protection to the ill-favored majority.

It has been said that,

> "Because of this 'delicate federal-state relationship', the federal courts have been very strict in requiring the plaintiff to allege not only a denial of federal rights by the state but also that the denial was accomplished for the purpose of *robbing plaintiff of those rights.* (See *Egan v. City of Aurora,* 74 F. Supp. 794, 798).

The Complaint below, it is respectfully suggested, contains very clear allegations and contentions of a plaintiff being robbed "of constitutional rights".

The same case cites the fear that there is an "increasing danger that civil rights legislation may be used as an abusive measure against public officials".

There is also a correlative and growing danger that with burgeoning bureaucracies, officials may use their

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discretionary powers as an abusive measure against the public, and this is what the Complainants complain of here.

7. Bad Faith

The *Egan* case *supra,* went on to say that in order to keep the balance referred to, it is "each judge's duty to protect public officials in the *good faith* performance of their duties from irresponsible litigation."

The allegations of the Complaint here are scarcely consonant with a "good faith" performance of public duties. So saying, it would seem that the honorable Court below was in error in finding that there was no violation of personal liberties and it seems strange, not to say, it is respectfully suggested high handed, for the Appellate Court to have refused any review consideration whatever.

In the *Egan* case, the court also said,

> Where the states have reasonably effective safeguards or remedies, a restrictive reading of the Acts is called for . . . The theory of the action should also be considered in deciding how strictly to construe the Acts. If the theory is merely one of tort, then the Acts should be construed strictly, but if the theory is to alter official conduct, a more liberal construction may be called for. If the action is for individual redress, then the Acts should be construed more strictly than in a broad class action, which would be more in keeping with the philosophy of the Acts."

The Plaintiffs are quick to say that their purpose is to "alter official conduct" and to point out that they have brought a "broad class action." *Egan v. City of Aurora* also speaks, at page 797, of the purpose of the Civil Rights Acts in protecting persons "from extortion of property

by (constitutionally forbidden) methods". That we have here, too.

8. There Was a Taking of Property

In *United States v. Causby*, 328 U.S. 256 (1946), a case in which the question of substantive Due Process was treated, the government had an airport next to the Plaintiff's land, and "its four-motored heavy bombers, other planes of the heavier type, and its fighter planes, had frequently passed over Respondent's land and buildings in considerable numbers and rather close together. . . ."

The Court said,

> "[I]f the flights over Respondent's property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States v. Miller*, 317 U.S. 369.
>
> ". . . [The fact that] enjoyment and use of the land are not completely destroyed . . . does not seem to us to be controlling.
>
> ". . . [The fact that] the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result.
>
> "We agree . . . that a servitude has been imposed upon the land."

An award of compensation was made.

So also, the Defendants propose to take the Complainants' land with a substantial degree of completeness, in effect, and leave them without remedy. The Appeals Court also, it seems, is intent on leaving them remediless; it would not hear their argument. It is respectfully and urgently argued that they abused their discretion.

CONCLUSION

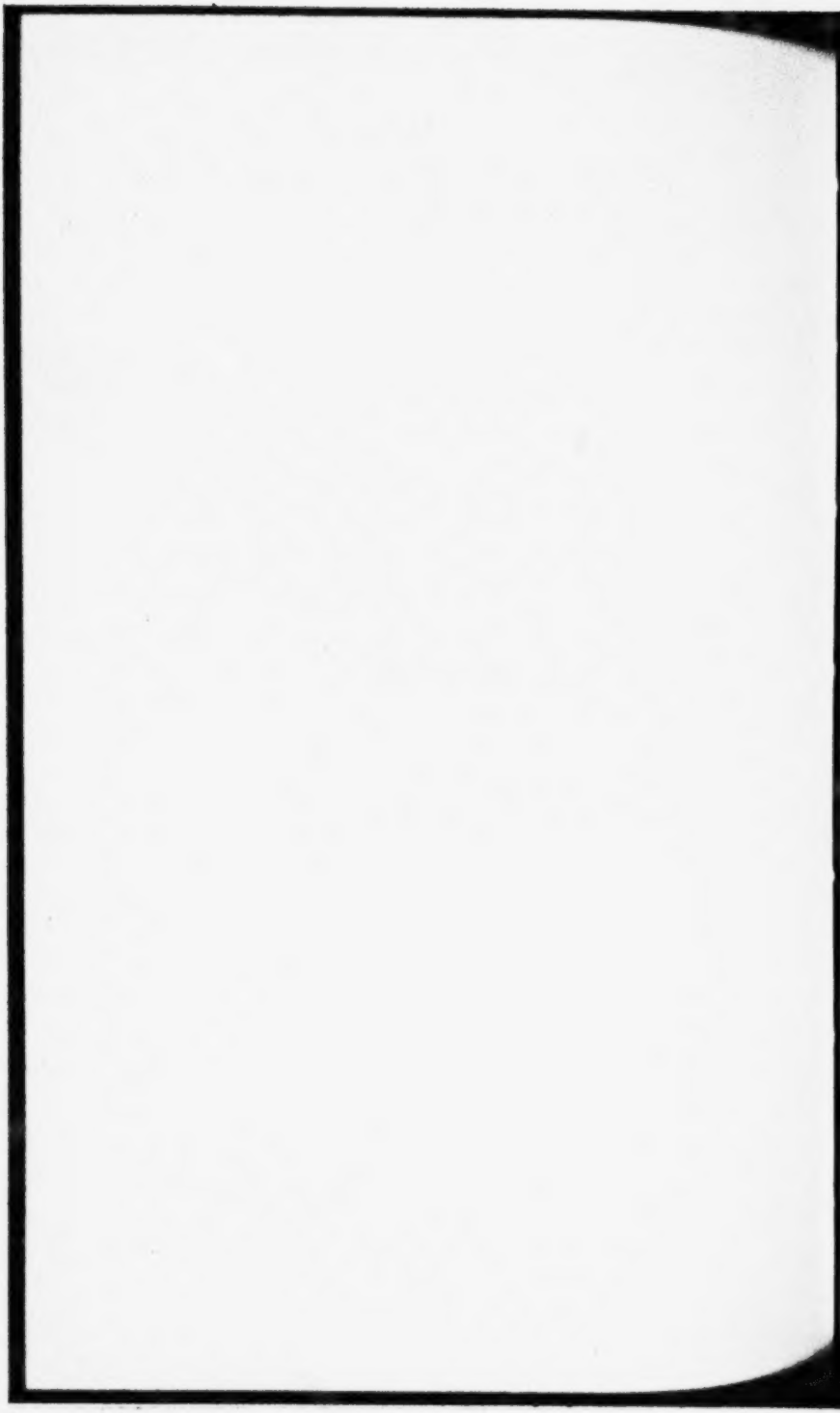
The Plaintiffs therefore request the issuance of the Writ of Certiorari, to correct what was, it is suggested, a clear abuse of discretion of the Fourth Circuit Court of Appeals, in granting the Defendants' Petition for Summary Affirmance, when so many, so serious, so urgent, environmental and constitutional questions, raised and newly-raised in this case thereby went undiscussed, unconsidered and unanswered by a Circuit Court of Appeals which was by its own design, not briefed either, apparently.

The lower Court has decided an important question of federal law which has not been, but should be, settled by this Court; and the Court of Appeals has so far departed from the accepted, *fair*, and usual course of judicial proceedings by refusal to hear the Plaintiffs, as to call for the exercise of this Court's power of supervision.

Respectfully submitted,

LEONARD J. KERPELMAN
Attorney for Appellants
2403 Rogers Building
Baltimore, Maryland 21209
SA 7-8700

APPENDIX



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ORDER DENYING RECONSIDERATION

Upon consideration of the telegram treated as a Motion for Reconsideration of the Order of Affirmance,

It is ORDERED that the Motion for Reconsideration be, and it is hereby, DENIED.

/s/ ALBERT V. BRYAN

Filed Feb. 4, 1970.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,823

Martin Whitcomb, et al.,

Appellants,

vs.

Sanitary Commission of Anne Arundel County, et al.

Appellees.

No. 20090 Civil

ORDER OF AFFIRMANCE

Upon consideration of the motion of the appellees to dismiss this appeal because of the failure of the appellants to file a bond for costs, it is

ORDERED that the said motion be, and it is hereby, denied; but, upon consideration of the motion of the appellees for summary affirmance of the judgment of the District Court, it is further

ORDERED that the said motion for affirmance be granted and that the judgment of the District Court now on appeal be, and it is hereby, affirmed, with costs to the appellees.

For the court:

ALBERT V. BRYAN,

United States Circuit Judge.

Filed Oct. 3, 1969

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[PROCEEDINGS]

Baltimore, Maryland, June 13, 1969.

The above entitled case came on for hearing on Motion of Defendants Frank E. Rice, et al to strike complaint, etc., before His Honor, R. Dorsey Watkins at 10 o'clock a.m.

APPEARANCES

For the Plaintiffs:

Leonard J. Kerpelman

For the Defendants:

John M. Court

(The Clerk) No. 20090 Civil, Martin Whitcomb and Romaine Whitcomb, his wife versus The Sanitary Commission of Anne Arundel County, and others.

Hearings on Motion of Defendants Frank E. Rice and Joseph Alton to strike complaint, and Motion of Defendants Frank E. Rice and Joseph Alton to dismiss.

Representing the Plaintiffs, Mr. Leonard J. Kerpelman; representing the Defendants, Mr. John M. Court.

(The Court) Mr. Kerpelman, in your complaint, apparently, you name the State of Maryland as a defendant, although you do not in the caption.

Was it intended that the State of Maryland be made a defendant?

(Mr. Kerpelman) It was not, Your Honor.

(The Court) I thought so.

Mr. Court?

(Mr. Court) If the Court pleases, on behalf of Frank E. Rice and Joseph Alton, respectively, the Director of

Public Works and the County Executive of Anne Arundel County in their official capacities and individually, we would like to ask the Court, pursuant to Rule 12(e) of the Federal Rules, to strike the pleadings, as it may in its discretion do by reason of the dilatory response of the plaintiffs to the motion for more definite statement.

(3) Simultaneously, we ask—

(The Court) Well, (on that, I am prepared to rule. In my discretion, I do not think it should be dismissed for failure to comply.

The Rules are intended to be followed, and there is reason for the time element, but nobody has been hurt by the 10 day delay, and while I don't encourage Mr. Kerpelman on that because he doesn't need encouragement along that line, I do not think a case of this sort ought to be dismissed on a perfectly proper, technical point, but one which I do not think has resulted in any adverse effect on the defendants.

(Mr. Court) If the Court pleases, we would then move that the complaint be dismissed for the reasons set forth in our motion to dismiss and the supporting memorandum.

In addition to which, we would like to cite certain pertinent case law which we have subsequently developed:

In the matter of Sarelas v. Sheehan—

(The Court) Now, you are in default; you should have had the memorandum in to me two days before the hearing.

(Mr. Court) Yes, Your Honor.

(The Court) But I am not going to refuse to hear you for that reason.

What are the cases?

(Mr. Court) Sarelas v. Sheehan, 326 F.2d, 490 at 491.

In this suit—

4) (The Court) Do you have some others?

(Mr. Court) Yes, Your Honor.

Ream v. Handley—

(The Court) I am familiar with that one.

(Mr. Court) Haigh v. Snidow, 231 F. Supp. 324 at 325.

Booth v. General Dynamics, 264 F. Supp. 465 at 470.

And Wallach v. City of Pagedale, Missouri, 264 F. Supp. 271 at 272.

I will not take up the time of the Court to attempt to brief those cases, but they substantially support the position we took in our memorandum, that there is no cause of action stated against the individual defendants in their representative capacities, because in their representative capacities, they represent the County of Anne Arundel, which is not a person in the sense of the Civil Rights Act.

(The Court) You cited what would be the controlling case, if it were in point, Monroe v. Pape, 365 U.S. 176, 191, but Pape recognized the right of action against the individuals, although the intent of the sovereign entity was not subject to suit, so aren't the Civil Rights Act provisions intended to cover the case in which a person, under purported authority of the state, acts in a way which violates the Civil Rights?

(Mr. Court) If the Court pleases, were it not for (5) the fact that the matter has been duly tested as to the authority of the County to act in the manner that it is acting, through its designated authorities, that could be true; there could be an individual discretion in the part of the defendants which is not here in that the matter has been carried through to a final determination in the Circuit Court of Anne Arundel County, and has not been carried to an appeal at the Court of Appeals.

(The Court) No Federal question, however, was raised in the Anne Arundel County case, was it?

(Mr. Court) That is correct, your Honor.

(The Court) Well then, under England v. Medical Examiners, 375 U.S. 411, is it not open in the Federal Courts? That is a most interesting case, where it laid down the law for one case only, but said that where the Federal issues have not been fully submitted to and relied upon by and decided by the State court, that they are available in the Federal court, and that if you advance them in the State court with a reservation, you may still proceed in the State court.

I must say, that before I read the case, my approach was the same as yours, that you had your day in the Maryland State Courts, why didn't you take your day and night and do everything at that time, but the case, it seems to me, makes it quite clear that if the points are not raised and decided—if (6) the Federal points are not raised and decided in the State court, which would permit a direct appeal to the Supreme Court, that then they can be litigated in this Court if otherwise they are proper points for litigation, if they truly raise the Federal issue.

I think the real point in your case is that this does not fall within the Civil Rights coverage, because it does not deal with personal rights or personal aspects or privileges; it deals with property rights, and there is a very—with one exception, I think, the whole weight of authority is to the effect that Civil Rights provisions are not intended to provide—now I interpolate—merely a different way in which property rights can be protected or vindicated.

You start with Holt v. Indiana Manufacturing Co., 1900, 176 U.S., 68 at 72, Hague versus Committee For Industrial Organization, 1939, 307 U.S. 496, 531 and then a fine resume of these cases in Ream v. Handley referred to by you, 7th Circuit, 1966, 359 F2d 728, and perhaps of even greater significance, Abernathy v. Carpenter, 208 F. Supp. 793, but that was a Three Judge District Court, and the holding there was affirmed per curiam in a one line decision by the Supreme Court, "The motion to affirm is granted," and the judgment was affirmed in 373

U. S. 41, and in the Abernathy case the court has emphasized, page 794, that: "whenever the (7) right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction***.

"In the case at bar, the deprivation, if there be any, is not one of personal liberty, but merely a property right***."

And then again on page 795, quoting from Holt in the Supreme Court, it says: "***it is sufficient to say that [the Civil Rights Statutes] refer to civil rights only ***."

And again referring to the Hague case, which is probably the foundation of the Supreme Court case, which is interesting in that no majority opinion was forthcoming, but the general basis of the decision was developed, and the result of it was that the Civil Rights Statutes are applied only where personal liberty is involved and not where the matter is solely a property or monetary right.

That, I think, is the critical point in the case.

Mr. Kerpelman?

(Mr. Kerpelman) If Your Honor pleases, typically in this courtroom, Your Honor does not need much to argue, because Your Honor gets right to the heart of the important issue in the matter.

(The Court) Thank you, sir.

Is a heart vulnerable, or do you want a transplant?

(8) (Mr. Kerpelman) Let's discuss that.

Your Honor, I believe that the heart of the matter is that this complaint, as framed, although it may be couched in terms which seem largely to be property rights, it is a complaint which goes a step further. It is talking about the health, safety and welfare, and the environment of the class in whose name the action was brought, and the complaint discusses the poisoning of the air, the harmful effect on the recreational use of Sandy Point

State Park, which is right next to the property of the nominal complainants, who are suing, who are bringing suit on behalf of the class.

(The Court) On the facts, I am entirely sympathetic; if I lived there, I would be very indignant, but that is not my problem.

The question is whether any violation of Civil Rights has occurred.

(Mr. Kerpelman) Well Your Honor, the point that I am making is that the Civil Rights concept of personal rights, as opposed to property rights, I respectfully urge, is encompassed in the language of the complaint, which has been, in effect, demurred to.

The complaint speaks of pollution, it speaks of the Water Pollution Control Act, it speaks of the surrounding air, it speaks of the effect on shell fish in the Bay, and throughout the whole State. It speaks of the effect of the (9) plant on the recreational use of the Bay as a whole, and for that reason, if Your Honor pleases, and this is our only argument, beside the one case which Your Honor said does not flow along with the majority of the cases, which is that property rights are not protected, but this is our main and substantial argument, that this is in the nature of a personal right and not a property right.

The right to breathe clean air, to have a recreation upon the Bay which does not stink, which has fish and game and recreational uses; this is not a property right, entirely. It is, perhaps, a quasi property right, we suggest, and it is, we suggest strongly, a civil right now, a personal right and not a property right.

(The Court) In the ordinary acceptation of a personal right, don't you have a case in which a particular individual is being discriminated against because of his status or lack of status? And while what you speak of would be of interest to the entire State, to everyone in the public, it seems to me to everybody in the State being deprived of a civil right is an anomaly.

As I say, it seems to me it is only where "A" is being treated differently from "B" and where it refers to "A's" personal rights to hold property, or sell property, or vote, as distinguished from the case in which everybody should be interested in having as clean a Bay and as clean an air as (10) we can get.

So, it seems to me that this does not fall within any ordinary concept of Civil Rights; that it is either a general right not to have a nuisance, and if it is installed and operated as a nuisance, I would think you would have a remedy in the State court, but I don't think this presents a Civil Right problem or question or case at this point.

I say again, my sympathies are with you, particularly after fishing on the Bay yesterday and not getting a strike, but, seriously, I think to have this stuff discharged where people bathe and where you have shell fish, and, hopefully, crabs and other fish is most undesirable, but I just can't see how that constitutes the invasion of the Civil Rights of these plaintiffs or of any individuals in the State.

(Mr. Kerpelman) Your Honor said it is not the ordinary kind of Civil Rights case, and that is true, Your Honor. This case, I would respectfully suggest, Your Honor, proceeds one step further, I think, than other cases have that I know of, at least which have gotten to the Circuit Court of Appeals level, in that we are, quite frankly, seeking to transform what is very similar to a property right into a Civil Right.

Your Honor speaks of the fact that in the typical Civil Rights case, one person is being discriminated against, is being persecuted, something is having a greater effect upon (11) him than upon others, but we have the problem, and it is a growing problem, which the courts are going to have to deal with, that where the right which is being taken away from one person is so minimal that of itself it would be de minimis lex, yet when aggregated over the entire group of citizens in the entire State, it is

far from de minimis, it is a very real and present and ominous threat to the body politic, the body economic, and the body social, and it is, we suggest, a deprivation of a personal right, for example, without question, to make a person ill in violation of his rights, say, to have undisturbed health.

However, if the plaintiff in a case is only statistically one out of a million persons who might be made ill from hepatitis from oysters, for example, then Your Honor is suggesting it is not a Civil Right violated. We suggest, we argue most strenuously, because we are representing a class, because we will proffer to show statistically that this plant is 99 per cent certain to become a nuisance by discharging dangerous material into the Bay, into the air, into the environment. The inference of the complaint is that that is what we would proffer by expert testimony.

We suggest, Your Honor, that it is in violation of a Civil Right, and beyond this—I won't belabor the argument, but that is our argument, that we are representing cumulatively a class, some of whose members statistically have (12) without question the fatal future of being felled by the acts of the defendants in the future, and we are seeking to protect them and the Civil Right which gives them the right not to become a statistic in a mortality table along with other things.

(Mr. Court) If the Court pleases, I observe that there exists the Federal Water Pollution Control Act, there exists the Maryland Department of Health; both of whom have concurred in the plans and construction of this particular plant, and that the remedy which the plaintiff demands in the Federal Court would appear to have been more properly presented for administrative review, either at the Federal or State level with the authorities concerned with this particular plant.

(The Court) Well, if he could state a proper case, then the fact, if it be a fact, that there are other available remedies would not necessarily deny the Court of Jurisdiction.

I feel, however, that the—while I state for the last time, I am in great sympathy for Mr. Kerpelman's fears, apprehensions and desire to keep the State as nearly liveable as can be, I feel that he has very frankly stated that that is a right which is common to all, and that, therefore, there is no discrimination involved in this, and it does not, therefore, fall within the ordinary field or any field, as far as I know, (13) of Civil Rights. It is more nearly a purely property right which is not the subject of jurisdiction of the District Courts under the Civil Rights Act.

There is, perhaps, one further matter that might be mentioned. There is a complaint of the failure properly to give notice under the appropriate provision of the Anne Arundel County Code; that, obviously, is not a Federal question. It is a question of the interpretation and application of the State statute, and it does not seem to the Court to give it any jurisdiction in that connection or in this connection.

Also, on notice, unquestionably, the plaintiffs did get notice because they have taken certain rather extensive actions, so that the informality, if there be one, of ignoring the statute with respect to notice, if that be the case, has not resulted in any harm.

Further, I think that the subject matter involved in the notice was not one intended to give notice to the adjoining property owners, as to any depreciation of their property, but was rather a means by which the public generally could say this is an improvident thing, we can't afford it, or it is being done improperly, so as a general public matter steps could be taken to remedy it one way or the other.

In short, for the reasons which I have attempted briefly to state in the colloquy with counsel, in part, I (14) feel that the Court does not have jurisdiction under the complaint as stated, even as amplified by the particulars, and the motion to dismiss will be granted.

(Mr. Kerpelman) May I ask a question off the record?

(The Court) Yes; off the record.

(Off the record discussion.)

(Hearing concluded.)